IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 25, 2008 Session

**TERRY E. JUSTUS v. STATE OF TENNESSEE**

**Direct Appeal from the Circuit Court for Sevier County**
**No. 11853-II Rex Henry Ogle, Judge**

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**No. E2007-01008-CCA-R3-PC - Filed May 14, 2008**

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The Petitioner, Terry E. Justus, pled guilty to two counts of second degree murder, and the trial court sentenced him to an agreed sentence of thirty-five years to be served at 100%. The Petitioner filed a pro se petition for post-conviction relief, which was amended by appointed counsel, alleging that he did not receive the effective assistance of counsel and that his plea was not knowingly and voluntarily entered. The post-conviction court dismissed the petition after a hearing. On appeal, the Petitioner contends that his guilty plea was not knowingly and voluntarily entered because his trial counsel was ineffective for allowing him to enter the plea without the benefit of information relevant to his guilty plea, namely: (1) the outcome of his motion to suppress; and (2) the results of a DNA report. After reviewing the issues and applicable authorities, we affirm the post-conviction court's judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and J.C. MCLIN, JJ., joined.

Ronald C. Newcomb, Knoxville, Tennessee, for the Appellant, Terry E. Justus.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Jennifer L. Bledsoe, Assistant Attorney General; James B. Dunn, District Attorney General; Steven R. Hawkins, Assistant District Attorney General, for the Appellee, State of Tennessee.

## OPINION
## I. Facts

A Sevier County Grand Jury indicted the Petitioner for two counts of first degree murder. At the hearing on the Petitioner's guilty plea to two counts of second degree murder, the State informed the trial court that, had the case gone to trial, the evidence would have shown:

[T]he [Petitioner] and the victim, Sharon Acosta, had been dating for some time back in 2005, and . . . during the course of this relationship she had become pregnant, [and] . . . tensions began to rise in the relationship as a result of that pregnancy. She wanted to have the child, she wanted him to be the father and to marry and to raise this kid and help support the child. He was concerned that he didn't want his parents to even find out that he had irresponsibly gotten her pregnant. That was what he said in his words to the officers.

But in any event, on July the 1st of 2005, which was a Friday, she, Ms. Acosta, the victim, came after work, came from Knox County, up here to Sevier County to his residence to spend some time with him, I guess the weekend. We don't [know] for sure how much time she would have spent but she did spend that night. The proof would show that she turned up missing, she never came back to Knox County. Her family became concerned. They notified the Knoxville Police Department. They began to conduct a missing person's investigation. This was later on, some days later. That they determined that the last place that she had gone was to his home, that they sought the assistance of the Sevier County Sheriff's Department in that investigation. That he had been talked to for some time, that he had denied knowing what had happened to her, said that she had been there for a while but she had left, basically denied knowing anything about what had happened to her or his involvement in her death.

The proof would show that as the investigation continued that the [Petitioner] finally admitted that, in fact, she had come to his home, that she had spent the night, that the next morning when they had gotten up that the argument ensued, again, over whether or not he should tell his parents about the pregnancy. According to him he said that she began to fight him, that she got on top of him and was holding him down and that he, in order to get her off of him, took an electrical wire that was lying on the floor where he had been doing some wiring in the home, a large piece of electrical wire, and put it around her neck, and while he was lying underneath her, choked her. That he further said that afterwards he took the body of Ms. Acosta and took it to a subdivision that was being developed somewhere nearby and had placed the body in a recently excavated hole and covered it up with some dirt. That further that, this would have been on a Saturday, the 2nd, that that evening, later that evening, he got a neighbor to follow him while he drove her car back down to Knoxville and left it at her place of employment where it was subsequently found.

The proof would have shown, your Honor, that he, in fact, took the officers out to where the body was located. They found the body. That an autopsy was performed by Dr. Mileusnic, who determined that, in fact, she had not been strangled as he said but she had been strangled manually, by manual strangulation, with him being on top of her, with her head being on something solid. And secondly, also determined that she, in fact, was pregnant and that the child was a viable fetus, that the child – its organs were fully developed, including

the heart and the lungs. And then, of course, that both – when the mother was killed, of course, the child was killed as well.

Although the Petitioner did not file an appeal, he subsequently filed a pro se petition for post-conviction relief, alleging that he received the ineffective assistance of counsel and that his guilty plea was not knowingly and voluntarily entered. The trial court appointed him counsel, and counsel amended the petition. At a hearing on the petition, the following occurred: Edward C. Miller ("Counsel") testified that, when he represented the Petitioner, the Public Defender's Office was understaffed. He agreed he was "extraordinarily taxed" at the time because he also represented two defendants charged with high-profile murders.

Counsel testified that the Petitioner pled guilty on March 28, 2006. He also recalled that the State gave him the written results of the DNA report on April 4, 2006. Counsel testified that, while he did not receive this report until after the plea, he received the results of the DNA testing before the plea. Counsel did not specifically recall telling the Petitioner about the DNA results, but he said it was his practice to communicate that type of information to his clients. Counsel recalled from his file that, on January 11, 2006, he filed a motion for DNA testing because the State had not yet tested the DNA found underneath the victim's fingernails. On that same day, Counsel filed a motion to have the pills found in the victim's possession tested. Counsel said that the DNA report, which concluded that the Petitioner's DNA was under the victim's fingernails, could have been interpreted two ways: (1) that the victim struck the first blow, which corroborated the Petitioner's self-defense theory; or (2) that the Petitioner was choking the victim to death and she was fighting for her life. Counsel agreed that he would have needed the DNA report before trial and said that the same information used for trial was also necessary for plea negotiations.

Counsel agreed that the Petitioner had scratches on him after this killing. He said that he was unsure whether those scratches were offensive or defensive in nature, meaning he did not know whether the victim made those scratches on the Petitioner while attacking the Petitioner or while fighting for her life. He said that the scratches proved some "mutual combat."

Counsel agreed that he filed a motion to continue dated March 7, 2006. In support of the motion, Counsel cited that he had been unable to view discovery in the possession of the Knoxville Police Department, had difficulty with the police department not returning his calls, and had concerns that the State had not disclosed relevant *Brady* information. About the alleged *Brady* violation, Counsel said the police told the Petitioner during his interview that they had information that the victim was on drugs. The police later said that this was not true and that they were using that information as an investigative tool to get the Petitioner to admit some participation in this crime. In response to Counsel's allegations of a *Brady* violation, the State put in the record at the guilty plea hearing that the victim had, in fact, had a history of domestic violence with her first husband.

Counsel testified that, on March 17, 2006, he filed a motion to suppress the Petitioner's initial statements to police, alleging the Petitioner was not properly given his *Miranda* warnings. The trial court never ruled upon this motion. Counsel testified that it would have weakened the

case against the Petitioner somewhat if the Petitioner's statement had been suppressed. He said, however, that the Petitioner had confessed to several of the Petitioner's employees, so the State would still have a case against the Petitioner.

On cross-examination, Counsel testified that a self-defense theory was a viable defense for the Petitioner's killing of his girlfriend, but it was not an appropriate defense for his killing of her baby. Counsel also testified about the strength of the State's case without the Petitioner's statement. The State had witnesses who would testify that the victim was in a romantic relationship with the Petitioner, and she went to see him the weekend before she was reported missing. Another witness would testify that the Petitioner asked him to follow him in the middle of the night while the Petitioner drove the victim's car to her place of employment, where her car was found after she was missing. The Petitioner never offered Counsel an explanation for why he drove the victim's car to her place of employment during the late night hours.

The State also planned to call two witnesses to whom the Petitioner had confessed. Counsel interviewed both of these witnesses. Counsel agreed that the Petitioner told one witness that he had killed the victim because she was pregnant with his child and was going to tell his parents of her condition. Counsel said the Petitioner was from a very religious family, and he knew that his getting the victim pregnant out of wedlock would have hurt the family. The Petitioner told this witness that he was afraid his parents would insist he marry the victim, and he did not want to marry her. He told the other witness the same story and that he planned to confess to the police.

When the Petitioner first spoke with the police he never raised the issue of self-defense; rather, he denied all involvement. Counsel was worried about the success of a self-defense theory because of the Petitioner's initial denial and because the Petitioner hid and disposed of the victim's body. The autopsy showed the baby died of suffocation because the victim was buried. Counsel said that, even if the Petitioner's statements were suppressed, there was ample evidence that the Petitioner committed this crime.

Counsel testified that the police found some pills in the victim's car. He did not pursue chemical testing of these pills because he received the autopsy report on March 9, 2006, which concluded there were no drugs found in the victim's blood. Counsel described the Petitioner as having "above average" intelligence, and Counsel never considered him incompetent.

Counsel testified that, before the guilty plea, he did not have a written copy of the DNA report, but the State had informed him about the results, which concluded the Petitioner's DNA was underneath the victim's fingernails. Counsel and the State told the trial court as much at the guilty plea hearing. Counsel noted that the Petitioner's only wounds after this killing were scratches to his face and one scratch on his leg.

Counsel testified that the Petitioner told him he had been working with electrical wire when the victim attacked him, and he strangled her with a "smaller" gauge electrical wire. Counsel's own expert pathologist indicated the Petitioner's explanation was not possible because the victim suffered broken bones in her neck. Those bones could have only been broken by a

larger gauge wire or by manual strangulation. The doctor who conducted the two autopsies, whom Counsel also interviewed, said it was more likely that the victim was lying on the ground when she was strangled. This also contradicted the Petitioner's assertion that he was lying on the ground with the victim on top of him when he strangled her. Counsel testified that they designed the plea so that the Petitioner could eventually be released from prison and have some of his life left. Counsel said that this plea was one of the better ones that he had seen.

On redirect examination, Counsel agreed that it was always better to have as much information as possible before accepting a plea. He, however, felt it was in the Petitioner's best interest to accept the plea offered to him by the State.

The Petitioner testified that Counsel communicated the plea offer to him days before he pled guilty. He then said he only had overnight to consider the plea offer. The Petitioner testified that Counsel stressed to him the possible maximum punishment for his two charges. He testified that he was unaware of the DNA test results before he pled guilty and, had he had that information, it would have affected whether he pled guilty because it could possibly show grounds of self-defense. The Petitioner said he also did not know the outcome of Counsel's motion to suppress his statement to police, which he said "could possibly" have impacted his considerations about any plea offer.

The Petitioner did not recall whether he discussed a psychiatric or mental evaluation with Counsel. He said that he would not know if he needed such an evaluation. The Petitioner asserted that Counsel never discussed with him lesser included offenses. While Counsel described the definition of second degree murder to him, the Petitioner's judgment was "clouded" by the possibility of receiving life in prison. The Petitioner testified he had no prior criminal history.

The Petitioner testified that Counsel never discussed with him the pills found in the victim's car and the allegations that the victim had committed acts of violence or suffered a mental illness. The Petitioner said that Counsel did not adequately explain to him about the viability of the fetus.

The Petitioner stated that, at the time of this killing, his ex-wife was suing him for "complete and total control" of their children as well as his personal and financial belongings. The Petitioner denied ever telling either of the witnesses that he intentionally killed the victim.

On cross-examination, the Petitioner testified that he had graduated from high school, and he had opened a business, where he had two employees, shortly before these killings. Before opening his own business, the Petitioner worked for a power tool store as a manager. The Petitioner conceded that he signed the plea agreement on March 21, 2006, but did not plead guilty in court until a week later. The Petitioner said that he planned to argue self-defense had the case gone to trial. He estimated that the victim was five feet eight inches to five feet ten inches tall, and he said that he was six foot three or four inches tall. The Petitioner agreed that he drove the victim's car back to her place of employment and that he buried her and her baby at a construction site where he thought they would not be found.

Based upon this evidence, the post-conviction court denied the petition for post-conviction relief.

## II. Analysis

The Petitioner asserts that his guilty plea was not knowingly and voluntarily entered because his trial counsel was ineffective for allowing him to enter the plea without the benefit of information relevant to his guilty plea. First, he complains that his motion to suppress was not ruled upon before he pled guilty. Second, he did not learn of a DNA report that might have corroborated his self-defense theory until after he entered his guilty plea, which was a violation of *Brady v. Maryland*, 373 U.S. 83 (1969).

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2006). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to a de novo review by this Court; however, we must accord these factual findings a presumption of correctness, which can be overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely de novo review by this Court, with no presumption of correctness. *Id.* at 457.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and Article I, section 9 of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

> First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688 (1984)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland,* 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland,* 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a petitioner in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *Id*.

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994). When a petitioner makes a claim of ineffective counsel within the context of a guilty plea, the petitioner must demonstrate a reasonable probability that, but for counsel's deficiency, the petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59(1985); *Manning v. State*, 833 S.W.2d 635, 637 (Tenn. Crim. App. 1994).

Post-conviction relief may be granted only if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103 (2006); *Jaco v.* State, 120 S.W.3d 828, 831 (Tenn. 2003). The Due Process Clause of the United States Constitution requires that guilty pleas be knowing and voluntary. *Id.* When evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the

alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (citations omitted). The court reviewing the voluntariness of a guilty plea must look to the totality of the circumstances. *See State v. Turner*, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995). The circumstances include:

> [T]he relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

*Blakenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993) (citations omitted). A plea resulting from ignorance, misunderstanding, coercion, inducement, or threats is not "voluntary." *Id.*

The post-conviction court in the case under submission found that the Petitioner did not prove his allegations by clear and convincing evidence. After a careful review of the entire record, we agree with the post-conviction court. About the DNA report, Counsel testified that the State told him the results of that report before the guilty plea. He said that, while he did not specifically recall telling the Petitioner those results, it was his practice to relay those results to his clients. We conclude that Counsel was not deficient in this regard. Further, we cannot find that the State committed a violation of *Brady v. Maryland* because the State informed Counsel of the results of the DNA testing before the guilty plea.

Even were we to conclude that the Petitioner did not know about the results of the DNA test and that Counsel was deficient for not informing him of those results, the Petitioner cannot prove prejudice. The Petitioner has not shown that, had he known of these results, he would not have pled guilty. The Petitioner testified that this information would have affected whether he pled guilty because it could possibly show grounds of self-defense. The DNA test results can be interpreted two ways with one interpretation perhaps supporting a self-defense theory. The other interpretation was that the victim was fighting the Petitioner for her life and scratched the Petitioner's face while he had her pinned on the ground strangling her to death. We cannot conclude that the Petitioner has proven, had he had these results, he would not have pled guilty and insisted upon going to trial.

We now turn to address the Petitioner's contention that his plea was not knowingly and voluntarily entered because his motion to suppress was not ruled upon before his plea hearing. The trial court found that this is routinely done, stating:

> [I]n every case where a defendant has made a statement to police officers, every defense attorney will file a motion to suppress that statement alleging something. Many of those motions are not argued. It all depends. In order to pursue it, you have got to have something to go on. The Court has heard nothing in this hearing, no evidence whatsoever to prove that the motion to suppress would have been granted. There is no cause to believe that there would have been because nothing

> has been presented here today to attack that statement and show that there would be any likelihood at all that even if the motion had been heard, that it would have been granted.

The evidence does not preponderate against the trial court's findings. The Petitioner has not presented any evidence showing that the motion to suppress would have been successful. Further, the Petitioner testified that knowing the outcome of the motion to suppress "could possibly" have impacted his considerations about any plea offer. This is clearly a failure to show prejudice.

Because we conclude that Counsel's performance concerning the motion to suppress was not deficient, we also conclude that the Petitioner has not proven that his guilty plea was not knowingly and voluntarily entered based upon that performance. The Petitioner is not entitled to relief on this issue.

## III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the judgment of the post-conviction court. We conclude that the evidence does not preponderate against the post-conviction court's finding that Counsel was not ineffective and that the Petitioner's guilty plea was knowingly and voluntarily entered.

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ROBERT W. WEDEMEYER, JUDGE